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The Immediate Implications of a No-Deal Brexit for Cross-Border Children's Cases.

Brexit is inevitably going to bring about the loss of Brussels IIa¹, an instrument of private international law which plays a vital role in cross-border children's cases.

Brussels IIa serves three core functions within the EU. It lays down jurisdictional rules, prescribing which Member State is competent to make decisions about a child. It provides a regime for mutual recognition and enforcement, so that court decisions concerning children can be effective in any EU Member State. Finally, Brussels IIa lays down a system of cross-border co-operation and communication between Central Authorities, which supports these functions and permits the sharing of information in relation to children involved in court proceedings.

There is another, similar, instrument which performs these functions which does not emanate from the EU; the 1996 Hague Child Protection Convention.² All EU Member States, and many states outside the EU, are also Contracting States to the 1996 Hague Convention.

The government's position was, until recently, that it wasn't enough for the UK to 'fall back' on the 1996 Hague Convention after Brexit, an instrument which many regard as inferior to Brussels IIa. In 2017, the government said that it wanted to create '*a new relationship based on mutually beneficial rules and processes to facilitate and enable cross-border trade, commerce and family life*'.³ This was a vague aspiration, lacking in detail as to how such a new relationship would be formed and governed.⁴

However, with the possibility of a 'no deal' Brexit looking more likely, it seems that it will not be possible to conduct this kind of bespoke legal framework with the EU 27. What's more, 'crashing out' of the EU in the event of no-deal would mean that there are not comprehensive transitional arrangements for cases that were issued before 29 March 2019.

Crashing out without a crash mat will in my view have some significant implications for children's cases with a cross-border element. My research examines the operation of private international law in a child protection context, an area where law provides an imperfect supporting framework for the practical working cases. I suggest that these cases will be further complicated, and potentially frustrated, by an abrupt exit from the European Union. I have given references to support my analysis, but of course others, and indeed courts, may interpret things differently and (I hope) in a manner which lessens any detrimental impact upon children involved in cross-border cases.

1. Pending cases might be affected.

You might assume that if you have a European cross-border case which started *before* 29 March 2019, it will continue to be governed by Brussels IIa after a no-deal Brexit, under some kind of transitional arrangement. However, that is not necessarily the case.

¹ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000

² Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children

³ Providing a cross-border civil judicial cooperation framework: A Future Partnership Paper 22 August 2017, Department for Exiting the European Union. <https://www.gov.uk/government/publications/providing-a-cross-border-civil-judicial-cooperation-framework-a-future-partnership-paper>

⁴ See House of Commons Justice Committee 'Implications of Brexit for the Justice System' 22 March 2017, HC 750 <https://publications.parliament.uk/pa/cm201617/cmselect/cmjust/750/750.pdf#page=16>

The government has produced a statutory instrument to deal with jurisdiction in family cases after a no-deal Brexit. The draft *Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) Regulations 2019* will come into force on exit day, if there is no deal. It will repeal Brussels IIa in its entirety.⁵

As to transitional arrangements, the statutory instrument says that Brussels IIa will continue to apply to;

*‘proceedings before a court in a Member State seised before exit day in reliance upon... the provisions of Chapter II jurisdiction of (Brussels IIa).’*⁶

Chapter II of Brussels IIa is the part of the Regulation which deals with jurisdiction. To an extent, the draft statutory instrument is consistent with the European Commission’s Notice to Stakeholders which says that EU Rules for international jurisdiction will continue to apply to proceedings initiated before exit day.⁷

I interpret this as meaning that if you issue proceedings before 29 March 2019, the jurisdictional rules in Brussels IIa will continue to apply to your proceedings after exit day.

So, for example, if you have jurisdiction in your proceedings on the basis of Article 8 Brussels IIa (habitual residence), you can transfer that jurisdiction to another Member State under Article 15 Brussels IIa even after exit day.

However, limiting the transitional arrangements to Chapter II Brussels IIa (jurisdiction), to the exclusion of the rest of the Regulation, has some potentially problematic implications for cases issued before 29 March 2019, which are continuing after exit day.

Below are some examples;

- It might lead to pending cases becoming segmented on exit day. Brussels IIa would continue to govern the jurisdictional basis of the case, but the 1996 Hague Convention would govern the recognition and enforcement of any orders made and would also be the applicable instrument for any cross-border co-operation required after exit day.
- Some chapters of Brussels IIa are inextricably linked to each other. For example, Article 11 (8) Brussels IIa falls within the jurisdiction chapter (Chapter II). This article permits an applicant to have a ‘second bite at the cherry’ and secure the return of an abducted child to the state of the child’s habitual residence, even after an order for the non-return of the child has been made under the 1980 Hague Convention Article 13. However, the enforcement of a return order made under Article 11 (8) is governed by Chapter III of Brussels IIa.⁸ So an applicant could issue proceedings under Brussels IIa before 29 March 2019, be successful in securing their child’s return under Article 11 (8) Brussels IIa, but then be unable to use the Regulation to directly enforce that return order in the relevant Member State.

2. Recognition and Enforcement could be tricky

⁵ (draft) Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) Regulations 2019 Reg 3

⁶ Ibid Reg 8

⁷ European Commission, ‘Notice to Stakeholders: Withdrawal of the United Kingdom and EU Rules in the Field of Civil Justice and Private International Law’ 18 January 2019,

https://ec.europa.eu/info/sites/info/files/notice_to_stakeholders_brexit_civil_justice_rev1_final.pdf

⁸ See Brussels IIa Article 42

As eluded to above, it would seem that in the event of a no-deal Brexit, applicants cannot avail themselves of the recognition and enforcement provisions of Brussels IIa after 29 March 2019 even if the order that they want to recognise / enforce was made before exit day.

There is a caveat to this. Most orders concerning matters of parental responsibility must go through the *exequatur* procedure before they can be enforced in another Member State.

This means that an applicant must obtain a declaration of enforceability (or registration for enforcement, as it is referred to in the UK) before the order can be enforced.⁹ If an applicant has already got this declaration of enforceability before exit day, they can still use the enforcement provisions of Brussels IIa to actually enforce their order.¹⁰ They might have to rush to get this before exit day, if they want to use Brussels IIa for the enforcement stage of their case.

Some orders don't need to go through the *exequatur* procedure if they have an appropriate certificate attached to them. Contact orders, and orders for the return of a child made under Brussels IIa Article 11 (8) (see above) can be directly enforced.¹¹ However, even if an applicant has a contact order or a return order, made before 29 March 2019, they won't be able to make use these advantageous provisions and directly enforce their order in the EU 27.

Instead they will have to seek the recognition and enforcement of their order under the 1996 Hague Convention. And the 1996 Hague Convention requires the *exequatur* procedure for the recognition and enforcement of all orders relating to parental responsibility,¹² meaning the enforcement process could take longer than anticipated.

The 1996 Hague Convention does have similar scheme to Brussels IIa for recognition and enforcement which can be used after Brexit, but....

3. You can't get legal aid in England and Wales for applications for the recognition and enforcement of orders under the 1996 Hague Convention.

As has been outlined previously,¹³ legal aid is not available applications to recognise or enforce orders under the 1996 Hague Child Protection Convention under the Legal Aid (Sentencing and Punishment of Offenders) Act 2012. It is available at present for the recognition and enforcement of orders under Brussels IIa.¹⁴ So if an individual has an order from an EU Member State (or a Contracting State outside of the EU) concerning a child, they won't be able to get legal aid to recognise or enforce that order in the UK under the 1996 Hague Convention after 29 March 2019.

4. Cross-border co-operation might be impacted.

Both Brussels IIa and the 1996 Hague Convention have schemes for cross-border co-operation between Member States and between Contracting States, through Central Authorities.

⁹ Brussels IIa Article 28

¹⁰ European Commission, 'Notice to Stakeholders: Withdrawal of the United Kingdom and EU Rules in the Field of Civil Justice and Private International Law' 18 January 2019, https://ec.europa.eu/info/sites/info/files/notice_to_stakeholders_brexit_civil_justice_rev1_final.pdf Para 2.1

¹¹ Brussels IIa Section 4 Chapter III

¹² 1996 Hague Convention Article 26

¹³ Anne-Marie Hutchinson OBE QC (hon), Michael Gratton 'Availability of Legal Aid for Applications Pursuant to the 1996 Hague Convention' 5 February 2018, Family Law Week, <https://www.familylawweek.co.uk/site.aspx?i=ed187827>

¹⁴ LASPO 2012 Sch 1 Para 17 (1) (c)

However, the EU's Note to Stakeholders suggests that if a co-operation request was made to the Central Authority under Brussels IIa before 29 March 2019 and it has not been resolved by exit day, it may be that a further request needs to be made under the equivalent provisions of 1996 Hague Convention.¹⁵ This is also something that could impact upon cases involving cross-border co-operation using the EU Service Regulation,¹⁶ EU Taking of Evidence Regulation,¹⁷ and European Judicial Network for judicial co-operation.¹⁸

5. It might not be possible to transfer jurisdiction from an EU Member State to the UK

There are many differences between Brussels IIa and the 1996 Hague Convention, which have been outlined in detail elsewhere.¹⁹ However, there is a difficulty in the interaction between the two instruments which may present problems in the immediate aftermath of a no-deal Brexit, particularly in a child protection context.

Brussels IIa permits the transfer of substantive jurisdiction between Member States under Article 15. The 1996 Hague Convention also permits the transfer of jurisdiction between Contracting States under Articles 8 and 9.

However, there is a problem with the interaction between Brussels IIa and the 1996 Hague Convention which frustrates transfers of jurisdiction from EU Member States to 1996 Hague Convention Contracting States.

All EU Member States (except Denmark) use Brussels IIa. All EU Member States have also ratified the 1996 Hague Convention. The interaction between these two instruments is governed by a disconnection clause. Brussels IIa takes priority over the Convention where a child has their habitual residence on the 'territory of a Member State' in relation to matters governed by the Regulation.²⁰ So in most cases, Brussels IIa is used instead of the 1996 Hague Convention by EU Member States. One of the problems with this is that Brussels IIa only permits a transfer of jurisdiction from one Member State to another, and not from a Member State to a 1996 Hague Convention Contracting State.²¹

On 'no deal' exit day, the UK would become a Contracting State outside of the EU. This could mean that it will not be possible for jurisdiction in children's cases to be transferred from EU Member States to the UK after a no-deal Brexit.

¹⁵ European Commission, 'Notice to Stakeholders: Withdrawal of the United Kingdom and EU Rules in the Field of Civil Justice and Private International Law' 18 January 2019,

https://ec.europa.eu/info/sites/info/files/notice_to_stakeholders_brexit_civil_justice_rev1_final.pdf Para 4

¹⁶ Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), OJ L 324, 10.12.2007

¹⁷ Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters OJ L 174, 27.6.2001

¹⁸ [Council Decision 2008/976/JHA of 16 December 2008](#)

¹⁹ See Paul Beaumont 'Private international Law Concerning Children in the UK after Brexit: Comparing Hague Treaty law with EU Regulations' (2017) *Child and Family Law Quarterly* 29 (3) 213; Nigel Lowe 'What are the implications of the Brexit vote for the law on international child abduction?' (2017) *Child and Family Law Quarterly* (29) 3, 253.

²⁰ Brussels IIa Article 61 (a); 62 (1)

²¹ *West Sussex County Council v H* [2014] EWHC 2250 (fam). For an alternative interpretation of the disconnection clause in Brussels IIa (which pre-dates the drafting of the recast of Brussels IIa) see Henry Setright and others, *International Issues in Family Law: The 1996 Hague Convention on the Protection of Children and Brussels IIa* (Family Law 2015) 1.28-1.36)

There are lots of cases which could be impacted by this, but particularly those where a family from the UK to an EU Country to escape care proceedings or in anticipation of Local Authority intervention. Often, Article 15 is used to transfer jurisdiction in these cases back to the UK. There are numerous reported cases involving the Republic of Ireland and the UK which fall into this category.²² It is unclear whether the change to the legal framework surrounding these cases brought about by a no deal Brexit will enable them to be determined in the same way.

Brussels IIa is in the process of being further revised, and the Recast version of Brussels IIa will resolve the problem outlined above. Proposed Article 75 (2) (b) of Brussels IIa Recast will permit an EU Member State to use the 1996 Hague Convention to transfer jurisdiction to a Contracting State outside of the EU.

However, Brussels IIa Recast is not yet in force across the EU. Thus, there is likely to be a gap between 29 March 2019 and the entry into force of Brussels IIa Recast where this problem may manifest itself.

Conclusion

A withdrawal agreement negotiated with the European Union would, to an extent, cushion the blow caused by the loss of EU private international law for children's cases heard in the UK. But a 'no deal Brexit' is likely to cause legal complications to existing cases, and those heard in the immediate aftermath of exit day. The family justice system in England and Wales is already under considerable strain and legal aid is hard to come by for many parents who need access to justice. What is not needed in this context is an event which further compounds and complicates an already overstretched and under-resourced system.

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²²See, for example, *CFA (Ireland) v F* [2018] EWHC 939 (Fam); *Child and Family Agency (Ireland) v M & Ors* [2018] EWHC 1581 (Fam); *Re S* [2018] EWHC 3054; Case C-428/15 *Child and Family Agency v D* (R Intervening) EU:C:2016:458; EU:C:2016:819; *HJ (A Child)* [2013] EWHC 1867 (Fam); *LM (A Child)* [2013] EWHC 646 (Fam).